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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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ROBOSERVE, INC.,
*Petitioner,*

v.

KATO KAGAKU CO., LTD.,
*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the court of appeals, when faced with an important and recurring question of state law, should have certified that question to the state supreme court instead of resolving it in a way that was unsupported by state court decisions.

## PARTIES TO THE PROCEEDING

Petitioner Roboserve, Inc., a Delaware corporation, and respondent Kato Kagaku, Ltd., a Japanese company, were the only parties to the proceeding in the court of appeals. Citylink Group, Ltd., a British company, is the parent corporation of Roboserve, Inc. Roboserve, Inc., has no non-wholly-owned subsidiaries.

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## PETITION FOR A WRIT OF CERTIORARI

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Roboserve, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-29a), as modified by its subsequent order (App. A, *infra*, 30a-35a), is reported at 78 F.3d 266. The opinion of the district court (App. B, *infra*, 36a-75a) is reported at 873 F. Supp. 1124.

## JURISDICTION

The judgment of the court of appeals was entered on February 23, 1996. App., *infra*, 1a. The court of appeals entered an order amending its opinion on March 18,

1996. App., *infra*, 30a. A timely petition for rehearing was filed on March 29, 1996, and denied on May 6, 1996 (App. C, *infra*, 76a-77a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

1. Petitioner Roboserve, Inc., leases and services hotel minibars. Respondent Kato Kagaku Co. owns the Hyatt Regency Hotel in Chicago (HRC). In June 1986, Roboserve entered into a Concession Agreement and revenue sharing agreement with the Hyatt Corporation, which manages the HRC. App., *infra*, 2a; Pl. Exh. 1 at 1. The agreement provided that Roboserve would install 1000 of its minibars (called "Robobars") in rooms in the HRC. The agreement further provided that Hyatt would use "reasonable endeavours" to place those guests most likely to use minibars in the rooms with Robobars, and to encourage those guests to use Robobars. In October 1986, Roboserve and Hyatt negotiated an amended agreement, under which the Concession Agreement would be in effect for five years, starting from the date when all of the Robobar units had been installed. App., *infra*, 2a-3a, 37a.

By April 1987, Roboserve had installed 900 of the 1000 units. At that point Hyatt "decided to review the success of the Robobar program before proceeding with further installations" (App., *infra*, 3a). In late 1987, petitioner learned that Hyatt had agreed with ServiSystems, a competitor of Roboserve, to install ServiSystem's minibars in one of the towers in the HRC. David Zadikoff, a vice-president of Hyatt, subsequently wrote to Roboserve and explained that Hyatt's agreement with ServiSystems was "for a one-year test period only, so that [Hyatt] could evaluate [the] sales potential and [the] operational costs" of the competing systems. *Id.* at 38a.

In fact, at the time Zadikoff wrote the letter, Hyatt, unknown to Roboserve, had already signed a contract

with ServiSystems to provide ServiBars for the HRC "for a term commencing on May 15, 1988 and expiring on May 14, 1995." App., *infra,* 4a, 38a. Roboserve won the one-year test; it then began negotiating with Hyatt to replace the ServiBars with Robobars. *Id.* at 3a-4a, 38a. Hyatt continued those negotiations for three years. *Id.* at 4a. Finally, in February 1992, Hyatt "confessed that it had 'complications of another contractual agreement' " (*ibid.*) and said that it would not replace the ServiBars with Roboserve's units. In December 1992, Hyatt notified Roboserve that it was terminating the Concession Agreement. *Id.* at 4a.

2. Roboserve then brought this action against respondent in the United States District Court for the Northern District of Illinois.[1] Roboserve alleged that Hyatt, as respondent's agent, had breached the agreement and defrauded Roboserve.[2] The jury found for Roboserve on every count. App., *infra,* 1a. On the fraud count, the jury awarded Roboserve $1 million in compensatory damages and $6 million in punitive damages. *Id.* at 5a.

The district court, while reducing the damages award in other respects (App., *infra,* 74a-75a), specifically reviewed and upheld the award of punitive damages for fraud. *Id.* at 55a-58a, 73a-74a. Referring to the statement in Zadikoff's letter about the one-year trial, the district court explained that the jury could reasonably have found that "Hyatt made the untrue statement * * * and, subsequently, staged negotiations" so that "Roboserve would forego enforcing its rights * * * and so Hyatt could continue enjoying its allegedly more profitable agreement with ServiSystems." *Id.* at 52a-53a. The district court

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[1] The district court's jurisdiction rested on 28 U.S.C. § 1332.

[2] The court of appeals stated: "There seems to be no question that [respondent] can be held liable for Hyatt's actions taken on behalf of HRC." App., *infra,* 6a n.4.

noted that these actions constituted "a multi-year cover-up" (*id.* at 57a) and, after reviewing Illinois law (*id.* at 56a-57a), concluded that this was "a pattern of conduct sufficient to state a legally cognizable claim for punitive damages." *Id.* at 57a-58a. The district court further concluded that "given the duration and scale of" the fraud, "the jury's award of punitive damages was not against the clear weight of the evidence." *Id.* at 58a.

3. The court of appeals acknowledged that there was no basis for overturning the jury's conclusion that respondent should be liable for fraud. App., *infra*, 8a. But by a divided vote, the panel set aside the entire punitive damages award. The panel majority stated: "[W]e hold that a plaintiff seeking punitive damages under these circumstances must at least put forth some evidence of intent to injure * * *. Without malicious conduct and intent to harm, Roboserve is not due additional sums for the fraud and deceit [respondent] committed." *Id.* at 34a, 35a.

The panel majority conceded that Hyatt "played loose with its contractual obligations and was less than candid —and may even have lied" (App., *infra*, 33a). But, the panel majority asserted, this conduct amounted to "merely withdrawing business opportunities" (*id.* at 34a) and was "not enough" to support an award of punitive damages (*ibid.*), because Roboserve had not shown "that Hyatt or [respondent] intended to financially damage Roboserve" (*id.* at 33a).

Judge Ripple dissented. App., *infra*, 28a-29a. Although he said that "the amount of the award" in this case should be "reassessed," he rejected "the majority's * * * total abrogation of punitive damages on the fraud count" (*id.* at 28a). Specifically, Judge Ripple stated, the "standard for imposing punitive damages for fraud" should not be "limited to situations in which a single

factor—'intent to injure'—is present." *Ibid.* Judge Ripple then reviewed a number of decisions of Illinois courts that permitted the award of punitive damages in circumstances similar to those found here. *Ibid.* He concluded that under those decisions, "the presence of other aggravating circumstances, many of which do not rise to the level of an intent to injure, will justify the imposition of punitive damages for fraud." *Ibid.*

4. Roboserve sought rehearing, arguing that the panel majority's resolution of the punitive damages issue was inconsistent with several Illinois decisions. In addition, Roboserve specifically asked the court of appeals to certify the question to the Illinois courts, pursuant to certification procedures established by both the state and federal courts. Pet. for Reh. at 1, 13, citing Seventh Cir. R. 52 and Ill. S. Ct. R. 20. The court of appeals denied rehearing without comment. App., *infra*, 76a-77a.

## REASONS FOR GRANTING THE PETITION

This case presents a recurring and important question of judicial federalism on which the decisions of the courts of appeals are in disarray. The court below was confronted with an issue of Illinois law that is of manifest importance. A certification procedure was readily available to the court of appeals, whereby it could have referred that question to the Illinois Supreme Court for decision. Nonetheless the panel majority resolved the state law issue without asking the state supreme court for guidance, and it resolved that issue in a way that is in obvious tension with the existing Illinois precedents.

The situation that arose in this case is increasingly common throughout the nation. Important and unresolved questions of state tort and contract law arise, with great frequency, in diversity actions in the federal courts. Some courts of appeals will certify those questions to state courts. Others, however, such as the court below, take it upon themselves to resolve these issues, sometimes in ways

that are at odds with state court decisions, even though a certification procedure is readily available. The Court should grant certiorari in this case to resolve the disagreement among courts of appeals over the proper use of certification in cases of this kind, in keeping with the principle—a bedrock of American judicial federalism—that in cases such as this, "the law to be applied * * * is the law of the State." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

1.a. Nearly ninety years ago, Justice Holmes praised certification as a procedure that should "be encouraged as a mode of disposing of cases in the least cumbersome and most expeditious way." *Chicago, Burlington & Quincy Railway Co. v. Williams*, 214 U.S. 492, 495-96 (1909) (dissenting opinion). But the form of certification at issue here—certification of a question of state law from a federal to a state court—is a more recent innovation. In 1960, the Supreme Court first endorsed the certification of a question from a federal court to a state court in a diversity case. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 212 (1960). At that time, however, only one state —Florida—had a procedure allowing for such a certification. See *id.* at 212 (commenting on the "Florida Legislature['s] * * * rare foresight"), citing Fla. Stat. Ann. § 25.031 (West 1957); Yonover, *Ascertaining State Law: The Continuing* Erie *Dilemma*, 38 De Paul L. Rev. 1, 15-16 (1989).

The next time this Court ruled on the lower courts' use of certification in diversity cases, in 1974, a handful of additional states had made such procedures available. *Lehman Bros. v. Schein*, 416 U.S. 386, 390 n.7 (1974) (citing statutes and rules). In *Lehman Bros.*, the Court reviewed a court of appeals decision that had resolved an issue of state law, over the dissent of a judge who urged certification. *Id.* at 389-90. This Court vacated the court of appeals' decision and remanded "so that that court may reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court." *Id.* at

391-92. The Court stated that the use of certification is not "obligatory" but "rests in the sound discretion of the federal court." *Id.* at 391. But the Court again went out of its way to encourage the use of certification, stating that "the certification procedure * * * in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Ibid.* (footnote omitted). See also *Elkins v. Moreno*, 435 U.S. 647, 662 n.15 (1978); *Bellotti v. Baird*, 428 U.S. 132, 150-51 (1976).

b. Today certification is far more widely available than it was at the time of *Lehman Bros.* Only six states lack procedures allowing federal courts of appeals to certify questions to the highest court of the state.[3] But the increased availability of certification has been accompanied by a great divergence in the approaches taken by the courts of appeals.

Some courts of appeals have taken care to use certification in order to respect the prerogatives of state courts, especially in cases presenting important and recurring questions of state law. For example, the Eleventh Circuit has repeatedly taken the position that when a state law issue has "significant public policy ramifications, and we are in doubt about the matter * * * [we] should certify the question to the state supreme court to avoid making unnecessary state law guesses and to offer the state court the opportunity to interpret or change existing law." *Hamilton v. Cannon*, 80 F.3d 1525, 1534 (11th Cir. 1996); see also *Pogue v. Oglethorpe Power Corp.*, 82 F.3d 1012, 1017 (11th Cir. 1996); *Colonial Properties, Inc. v. Vogue Cleaners, Inc.*, 77 F.3d 384 (11th Cir. 1996); *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 916-17 (11th Cir. 1995). Similarly, the Second Circuit will certify cases when "there is no dis-

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[3] See 17A C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 4248 at 167 & n.30 (1988 & Supp. 1996); Yonover, *A Kinder, Gentler* Erie: *Reining in the Use of Certification*, 47 Ark. L. Rev. 305, 314-15 & n.46 (1994).

positive [state] caselaw," a federal decision "might affect numerous other factual situations," and a misconstruction of state law "might lead to forum shopping to achieve or avoid federal disposition" of a claim. *Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234, 139 (2d Cir. 1996), petition for cert. pending, No. 95-1935 (filed May 24, 1996). See also *Grabois v. Jones*, 77 F.3d 574, 577-78 (2d Cir. 1996) (certifying an unresolved question "although it may not be a situation likely to arise with much frequency").

The Seventh Circuit, by contrast, has shown a "general reluctance to certify" questions to state courts; a study conducted in 1989 showed that the Seventh Circuit refused to certify questions in almost 75 percent of the cases in which a party requested certification.[4] Indeed at times the Seventh Circuit has shown an affirmative eagerness to decide uncertain state law questions, rather than allowing the state supreme court to resolve them. See, *e.g.*, *Diginet Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1395 (7th Cir. 1992) ("Some federal judges are timid about deciding issues of state law * * *. The[ir] fear is groundless."). Judge Ripple, who dissented from the panel decision in this case, has sharply criticized what he characterized as "this court's chronic underutilization of th[e certification] statute" (*id.* at 1402 n.1) and has suggested that the Seventh Circuit "suffer[s] from an institutional [deficiency] in this regard." *Ibid.*

c. It is particularly clear that, in this case, other courts of appeals would not have followed the course taken by the panel majority below. Of course, any time a determination "rests in the sound discretion of the federal court" (*Lehman Bros.*, 416 U.S. at 391), there will be variations among the lower courts. But the contrast between what the panel majority did in this case and the approach taken by other courts of appeals goes far beyond mere differ-

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[4] Yonover, *Ascertaining State Law: The Continuing* Erie *Dilemma*, 38 DePaul L. Rev. 1, 20 (1989).

ences in the discretionary application of a common standard. It reflects fundamentally different attitudes among the courts of appeals toward the importance of allowing state courts to be the primary expositors of state law.

The panel majority in this case did not merely decide that the punitive damages award, on the facts of this case, was excessive. Instead the panel majority propounded a general rule of Illinois law governing punitive damages and held that Roboserve was to be denied punitive damages altogether as a matter of law. App., *infra*, 35a. The rule the panel adopted was that punitive damages may not be awarded unless the plaintiff shows that the defendant "intended to financially damage" it. *Id.* at 33a. Under the panel majority's rule, even a sustained, egregiously deceitful course of conduct, like that which the panel majority conceded occurred in this case, cannot support a punitive damages award if the defendant was only promoting its own interests and did not have an affirmative "intent to injure" (*id.* at 34a, 35a).

This is precisely the kind of case in which other courts of appeals would have certified a question to the state supreme court instead of resolving it in this fashion. The Second Circuit, for example—referring to certification as "a valuable device for cooperation among the state and federal courts within this Circuit"—explained that certification was "especially" appropriate for "unsettled questions of state law" that "seem likely to recur and have significance beyond the interests of the parties in a particular lawsuit." *Kidney v. Kolmar Laboratories, Inc.*, 808 F.2d 955, 956, 957 (2d Cir. 1987). The question whether an intent to harm is a necessary element of a claim for punitive damages is not only "likely to recur"; it is virtually certain to recur. And obviously that question has great "significance beyond the interests of the parties" in this particular case. *Id.* at 957.

Moreover, to describe this issue as "unsettled" under Illinois law is to be unduly generous to the panel majority.

Illinois law on the availability of punitive damages for fraud has been reasonably clear since 1920. As the Illinois Supreme Court held, in a case presenting precisely that question: "Punitive damages are properly recoverable in a fraud action 'where the false representations are wantonly and designedly made.'" *Home Savings and Loan Assn. v. Schneider*, 108 Ill. 2d 277, 284, 483 N.E. 2d 1225, 1228 (1985), quoting *Laughlin v. Hopkinson*, 292 Ill. 80, 89, 126 N.E. 591, 595 (1920). *Schneider* held that punitive damages could be awarded in a case alleging fraud so long as the jury is instructed that it must find "wilful and wanton conduct." 108 Ill. 2d at 285, 483 N.E. 2d 1228. The jury was given such an instruction in this case. Tr. 1157.

The court in *Schneider* specifically held that an award of punitive damages was permissible on the facts of that case, even though there was no suggestion in *Schneider* that the defendant acted with an intent to harm the plaintiff. See 108 Ill. 2d at 284, 483 N.E. 2d at 1228. And no subsequent decisions in Illinois have drawn *Schneider* into question.[5] Indeed the Illinois intermediate appellate court has upheld awards of punitive damages for fraud in circumstances indistinguishable from those present here —where the fraud arose in the course of a commercial transaction, and there was no evidence that the defendant was motivated by an intent to injure the plaintiff. See, *e.g.*, *Poeta v. Sheridan Point Shopping Plaza Partnership*,

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[5] The panel majority ignored *Schneider* except to quote, twice, a subordinate clause from the *Schneider* court's opinion to the effect that "deceit alone cannot support a punitive damages award." App., *infra*, 32a-33a, quoting 108 Ill. 2d at 284, 483 N.E.2d at 1228. The full sentence in *Schneider* says essentially the opposite of what the panel majority's selective quotation suggests: "While deceit alone cannot support a punitive damage award, such damages may be allowed 'where the wrong involves some violation of duty springing from a relation of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly showing malice and willfulness.'" *Ibid.*, quoting *Laughlin*, 292 Ill. at 89, 126 N.E. at 595.

195 Ill. App. 3d 852, 856-57, 552 N.E. 2d 1248, 1250-51 (1990); *Four "S" Alliance, Inc. v. American Nat'l Bank & Trust Co.*, 104 Ill. App. 3d 636, 640-41, 432 N.E. 2d 1213, 1217 (1982). See also *Borcherding v. Anderson Remodeling Co., Inc.*, 253 Ill. App. 3d 655, 662, 624 N.E. 2d 887, 893 (1993).

The panel majority's opinion itself suggests that the majority saw its task as a matter of devising its own approach to punitive damages, rather than following Illinois law. In the crucial passage in which the panel majority sought to justify its rule governing punitive damages (App., *infra*, 33a-35a), the only Illinois source it cited was a pattern jury instruction—even though the jury instructions were not at issue in this case. The other authorities cited by the panel majority—on an issue on which there is no dearth of Illinois precedent—were, in order: (i) a decision from the Supreme Court of Ohio; (ii) Black's Law Dictionary; (iii) a decision from the Supreme Court of Indiana; (iv) a dissenting opinion from the Supreme Court of Alabama; (v) a decision of the Supreme Court of Alabama; and (vi) a previous decision by the court of appeals. It is difficult to imagine a more graphic demonstration that the panel majority in this case took its duty to follow state law much less seriously than other courts of appeals have.

2. This question merits the Court's review not just because the courts of appeals have adopted different approaches to certification but for a more fundamental reason. There is an increasing tendency among federal courts of appeals to take the lead in resolving important questions of state tort and contract law. Of course federal courts cannot be expected to certify every unresolved issue of state law to state courts. But when issues are of obvious importance, and will have ramifications far beyond the particular case, the duty of federal courts—established with absolute clarity by *Erie Railroad v. Tompkins, supra*—is to ascertain the correct interpretation of state

law, not to devise their own principles of law, however sound they might think those principles to be.

The decision below is only one example of this general tendency. It has happened with other state law questions of great importance. For example, the Eighth Circuit's decision in *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.), cert. denied, 488 U.S. 821 (1988), determined that, as a matter of Missouri law, the costs of cleaning up environmental harm for which an insured is legally responsible are not recoverable as "damages" under a standard liability insurance policy. This issue has spawned a great deal of litigation throughout the nation. See *Independent Petrochemical Corp. v. Aetna Cas. & Surety Co.*, 944 F.2d 940, 946 nn.7-8 (D.C. Cir. 1991) (citing cases), cert. denied, 503 U.S. 1011 (1992). But the District of Columbia Circuit subsequently concluded that, even giving "deference" to the Eighth Circuit's interpretation of the law of a state within its boundaries, the Eighth Circuit had simply "fail[ed] to apply * * * Missouri state law principles." *Independent Petrochemical Corp.*, 944 F.2d at 945.

Similarly, the Fifth Circuit resolved an important question of Mississippi products liability law in a series of cases begnning in 1989, holding that a plaintiff could not recover for an injury caused by an "open and obvious danger." *Melton v. Deere & Co.*, 887 F.2d 1241, 1243 (5th Cir. 1989); *Toney v. Kawasaki Heavy Industries, Ltd.*, 975 F.2d 162, 165 (5th Cir. 1992); *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1389 (5th Cir. 1992). In 1993, however, the Mississippi Supreme Court addressed the issue again and ruled that an open and obvious danger did not preclude recovery—and that its law had been to that effect since at least 1987, established by cases that the court of appeals had brushed aside. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 256 (Miss. 1993).

To some degree, of course, federal court errors in understanding state law are an unavoidable aspect of the regime established by *Erie*. But decisions like the one reached by the panel majority below are symptomatic of a broader problem—that federal courts, moved by their own conceptions concerning such subjects as punitive damages, have on some occasions determined that they are at least the equals of state courts in developing the law in difficult and unresolved areas of, for example, tort and contract law. This is not the role assigned to federal courts in our system. And when, as in this case, certification is readily available, it is especially inappropriate for a federal court to implement its own notions on an important and recurring issue of state law.

In the nearly one-quarter century since the Court, in *Lehman Bros. v. Schein, supra*, last addressed the question of certification in diversity cases—and vacated a decision because the lower court had not given adequate consideration to certification as an option—many changes have occurred. The availability of certification has exploded; and at the same time, federal courts have increasingly been called upon to decide crucial questions in rapidly-developing areas of state law. The Court should grant certiorari in this case in order to restore harmony among the lower federal courts on the use of certification, an important tool in maintaining the supremacy of state courts as "the principal expositors of state law." *Moore v. Sims*, 442 U.S. 415, 429 (1979).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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